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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK BERNARD POINTER,

Defendant and Appellant.

C064174

(Super. Ct. No.  
06F01113)

A jury convicted defendant Derek Bernard Pointer of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1); undesignated section references are to this code; count one), carrying a concealed weapon (§ 12025, subd. (a)(2); count two), and carrying a loaded firearm in a public place (§ 12031, subds. (a)(1), (a)(2)(A); count three). The jury also convicted defendant of resisting arrest, a misdemeanor (§ 148, subd.

(a)(1); count four). In bifurcated proceedings, the jury found a prior prison term allegation (§ 667.5, subd. (b)) to be true.

Sentenced to state prison, defendant appeals. He contends that the trial court erred in allowing evidence of a gunshot residue test and the two empty shell casings found in the gun. We will reject this contention. Defendant requests that this court review the sealed transcript and any documents in connection with his motion to compel disclosure of the personnel records of two officers filed pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We will conclude that the trial court did not abuse its discretion.

#### FACTS

About 11:00 p.m. on February 3, 2006, Sacramento Police Officer Garrett Dutra responded to a call of a disturbance (drinking, being loud, and shaking a parked car) in front of 2801 Atlas Avenue. Upon arrival, Officer Dutra and his partner, Officer Spencer, observed a group of six people standing at the corner in front of 2801 Atlas Avenue. The group included defendant who was holding a half-filled bottle of Hennessy liquor. Officer Dutra got out of his patrol car and told the group to stay where they were. Defendant began walking away. Officer Dutra told defendant to stop and to approach. Defendant responded that he would return after putting his keys into his car. When Officer Dutra ordered defendant to stop, defendant ran down the street.

Sacramento Police Officer Ryan Oliver arrived at 2801 Atlas Avenue when Officer Dutra ordered defendant to stop. When

defendant fled, both Officers Dutra and Oliver gave chase. Defendant ran on the sidewalk, then veered up into the front yard of 2831 Atlas Avenue, across the driveway, and then back to the sidewalk, while holding his hands in front of him, not swinging his arms. When defendant crossed the driveway at 2831 Atlas Avenue, Officer Oliver saw defendant use his left hand and throw a small shiny object. Officer Dutra saw defendant make the throwing motion but did not see an object. Instead, Officer Dutra heard a clanking sound immediately after the throwing motion.

After defendant returned to the sidewalk, he ran for another two or three hundred yards and then threw himself onto the ground where he was apprehended.

Officer Dutra returned to 2831 Atlas Avenue to look for the object discarded and, on the driveway, found a .22 caliber revolver with the initials "AK" scratched on the handle. The gun was loaded with four live rounds and two spent casings indicating that they had been fired. The gun appeared to have fresh concrete residue on it as well as grass. There were fresh scratch marks on the concrete driveway.

At the jail, a crime scene investigator used a gunshot residue test kit and swabbed defendant's hands, front and back. A criminalist analyzed the swabs and found gunshot residue on defendant's hands. The back of defendant's left hand had a particle containing lead, barium and antimony, characteristic of gunshot residue. The back of defendant's left and right hands had particles of lead and barium which were probable gunshot

residue particles. Defendant's hands also had particles with lead but were not necessarily associated with gunshot residue. The criminalist explained that one characteristic gunshot residue particle and seven probable gunshot residue particles were produced when someone fired a weapon or was near when the gun had been fired or handled a firearm that had been fired.

Defendant's supervisor at a heating and air company testified that defendant worked on February 3, 2006, and that he sometimes came into contact with lead.

Brian Foster stood on the corner about 40 feet from defendant when the police arrived. Foster watched 98 percent of the chase but did not see defendant leave the sidewalk and run into a yard. Foster did not see defendant put his hands in front of him or see him make a throwing motion.

#### DISCUSSION

##### I

Defendant contends that the trial court erred in allowing evidence of the gunshot residue test and the two empty shell casings found in the gun. We disagree.

#### **Background**

Defendant moved to exclude any reference to the gunshot residue test results as irrelevant, inadmissible character evidence and more prejudicial than probative. Because there was no evidence that there had been a shooting or that defendant had been involved in a shooting at the scene or that day or that the gun found had gunshot residue on it, defendant argued that the gunshot residue test results were irrelevant. If the

prosecution's theory of relevance was that the gunshot residue test results showed that defendant "was around a gun" and therefore possessed the gun found, defendant argued the evidence was propensity evidence and inadmissible character evidence. Finally, defendant argued the gunshot residue test results should be excluded because the evidence would require a substantial amount of time for examination of the witnesses involved, confused the issues because there was no evidence a gun was shot, and would mislead the jury into believing that he was involved in a shooting for which he was not being tried.

The prosecutor responded that the jury would hear evidence that the gun found had two spent shell casings in it as well as live rounds which was strong evidence that the gun had been fired. The prosecutor stated that an expert would explain that gunshot residue can be on a person's hand by simply touching a gun that had been fired. The prosecutor asserted that based on that evidence, the jury could draw a reasonable inference that defendant possessed the gun with two spent shell casings found on the driveway. The prosecutor claimed the gunshot residue evidence was extremely probative that defendant possessed the gun and outweighed any prejudicial effect.

In view of the prosecutor's arguments, defendant added that he sought to exclude any evidence that the gun found had spent shell casings and had been fired because there was no evidence of a shooting and it was too prejudicial.

The trial court denied defendant's motion to exclude the evidence.

## **Analysis**

“‘Relevant evidence’ means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) We review a trial court’s ruling on relevance for abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 474.)

“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

““A trial court’s exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]” [Citation.]” (*People v. Chavez* (2000) 84 Cal.App.4th 25, 30.)

Evidence Code section 1101 provides, in relevant part, as follows:

“(a) . . . [E]vidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . . ) other than his or her disposition to commit such an act.

"(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

A defendant's plea of not guilty places "the elements of the crime in issue for the purpose of deciding the admissibility of evidence [of uncharged misconduct] unless the defendant has taken some action to narrow the prosecution's burden of proof.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.)

The elements of being a felon in possession of a firearm (§ 12021) are "conviction of a felony and ownership, possession, custody or control of a firearm." (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) "With respect to the elements of possession or custody, it has been held that knowledge is an element of the offense." (*People v. Snyder* (1982) 32 Cal.3d 590, 592, 598.)

Defendant was charged with possession of the gun found on the driveway at 2831 Atlas Avenue. As defendant fled from the officers, he ran along the sidewalk, then up into the yard and across the driveway at 2831 Atlas Avenue, with his hands in front of him. As defendant crossed the driveway, Officer Oliver saw defendant make a throwing motion with his left hand and a

small shiny object flew out of his hand. Officer Dutra saw defendant make the throwing motion but did not see anything come out of his hand but did hear a clanking sound immediately after the throwing motion. Defendant returned to the sidewalk and ran for a few hundred yards and then threw himself on the ground where he was apprehended. Officer Dutra returned to the driveway and found the gun which had some concrete residue on it and the driveway had some fresh scratch marks. The gun had four live rounds and two spent shell casings. Defendant's left hand revealed a particle of lead, barium and antimony which is characteristic of residue left from the discharge of a firearm or from handling a firearm which had been fired. Defendant's hands also revealed particles of lead and barium which are probable gunshot residue particles. From the gunshot residue test results and the spent shell casings in the gun, the jury could reasonably infer that defendant possessed the gun found on the driveway. Defendant disputed that he possessed the gun. The evidence was relevant to show otherwise. That the jury could draw a "forbidden" inference from the evidence, i.e., defendant had committed another crime (discharging a firearm) amounting to inadmissible character evidence, does not warrant the exclusion of the evidence under Evidence Code section 1101; it was not offered as evidence of a prior crime. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 213-216.) The evidence was highly probative because only one officer saw defendant throw a shiny object and a defense witness claimed he did not see defendant make a throwing motion as he fled from the officers.



The other officer saw defendant make a throwing motion but did not see what, if anything, was thrown, but did hear a clanking sound. The gunshot residue test results linked defendant to the gun which had two spent shell casings. No evidence was offered that defendant had fired the gun or used the gun during a crime. There was evidence defendant could have the gunshot residue on his hands from just handling the gun. The trial court did not abuse its discretion in denying defendant's motion to exclude the residue tests or the spent shell casings.

## II

Defendant requests that this court review the sealed transcript and any documents in connection with his motion to compel disclosure of the personnel records of Officers Dutra and Oliver pursuant to *Pitchess*.

"On a showing of good cause a criminal defendant is entitled to discovery of relevant documents or information in the personnel records of a police officer accused of misconduct against the defendant. (Evid. Code, § 1043, subd. (b).) Good cause for discovery exists when the defendant shows both "materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.'" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016, fn. omitted.) To show materiality to warrant in-chambers review of the information in the arresting officer's personnel file, "a defendant need only demonstrate that the scenario of alleged officer misconduct could or might have occurred." (*Id.* at pp. 1016, 1027.)

As defendant acknowledges, the trial court found that he had made a showing of good cause for discovery and, after conducting an in-camera hearing, ruled that there was one item of discoverable information pertaining to each officer. To the extent defendant seeks appellate review to determine whether more was discoverable, we have reviewed the sealed transcript and conclude that the trial court did not abuse its discretion. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

MAURO, J.